RECORD
AND
BRIEFS

No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Complex Litigation Law Professors as Amici Curiae in Support of Respondents

RISHI BHANDARI
Counsel of Record
MANDEL BHANDARI LLP
80 Pine Street
33rd Floor
New York, NY 10005
(212) 269-5600
rb@mandelbhandari.com
Counsel for Amici Curiae

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

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INTEREST OF AMICI CURIAE

The *amici* are law professors who teach and write in the field of federal civil procedure and complex litigation. *Amici* share an interest in presenting this Court with an impartial view on the function of the class action and its relationship to the law of Article III justiciability to inform the question presented in this case.[1] The complete list of signatories is as follows:

Sergio J. Campos, Associate Professor of Law, University of Miami School of Law;

Robin J. Effron, Professor of Law, Brooklyn Law School;

Suzette M. Malveaux, Professor of Law, The Catholic University of America, Columbus School of Law;

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' consented to the filing of this brief. All parties' consented to the filing of this brief and written documentation of their consent is being submitted concurrently.

Alan B. Morrison, Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School;

David Rosenberg, Lee S. Kreindler Professor of Law, Harvard Law School;

Howard M. Wasserman, Professor of Law, Florida International University College of Law;

Stephen I. Vladeck, Professor of Law, American University Washington College of Law; and

Adam S. Zimmerman, Professor of Law, Loyola Law School, Los Angeles.

SUMMARY OF ARGUMENT

As interested professors of the law of complex litigation, we submit this *amici curiae* brief to clarify the function of the class action and how it has informed, and should continue to inform, the law of justiciability under Article III.

The function of the class action is to enable litigation for a class of individuals who each lack an economic incentive to bring their individual claims against a common defendant. The class action does so by (1) allocating the costs of investments in common issues among the class members, (2) using attorney's fee awards to motivate the class attorney to invest in common issues, and (3) providing incentive awards to class representatives to ensure they adequately represent the class, and in turn, conserve judicial resources by promoting the finality of any class judgment.

Because of these features of the class action, this Court has long recognized that the representative parties of a proposed class action retain a sufficient stake for Article III purposes to appeal the denial of class certification even when they lack an interest in their own individual claims. In short, the operation of the class action ensures that the objectives of the law of justiciability are met.

Microsoft does not challenge this well-settled area of law, but asks the Court to create a new exception.

Microsoft contends that this case is not justiciable because the respondents voluntarily dismissed their lawsuit. Petitioners' Br. at 34-41. Adopting the distinction that Microsoft offers—that a class representative cannot appeal the denial of class certification if she voluntarily dismisses her action—would introduce needless confusion into the law of Article III justiciability. This is especially true given the record in this case, where it is doubtful that the named parties have voluntarily dismissed their individual claims.

Accordingly, we urge this Court to refrain from upsetting this area of the law of justiciability and to conclude that the respondents' appeal of the denial of class certification is justiciable under Article III.

ARGUMENT

I. ARTICLE III TAKES INTO ACCOUNT THE FUNCTION OF THE CLASS ACTION.

This Court has consistently taken into account the function of the class action in determining whether the named parties seeking to represent a class have a sufficient stake in the litigation for purposes of Article III. As discussed in more detail below, this Court has considered the named parties' separate interest in representing the class, as well as the operation of the class action, in determining whether the requirements of Article III are satisfied.

A. The function of the class action is to enable litigation for numerous plaintiffs who each lack an incentive to bring an individual claim against a common defendant.

From the beginning, the modern class action has been understood as a procedure to allow numerous claimants to bring claims against a common defendant that are otherwise too small to be litigated separately. Shortly after promulgation of the first Federal Rules of Civil Procedure in 1938, the initial version of Rule 23 was recognized by scholars as a vehicle to "explore the possibilities of revitalizing private litigation to fashion an effective means of group redress." *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941). Specifically, the class action was seen as a solution to the problem of individuals who are "in no position to act for themselves because of . . . the disproportion between the expense of seeking redress and their individual stake in the controversy." *Id.* at 714.

This view of the function of the class action became enshrined in the Federal Rules of the Civil Procedure through the 1966 amendments to Rule 23. The 1966 amendments, which in large part continue to apply, created a new category of class actions which could be brought if common issues of law and fact "predominate[d]" the litigation and the class

action was "superior" to alternatives. Fed. R. Civ. P. 23(b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011).

The Rule 23(b)(3) category was created as a residual category to "encompass[] those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1966 amendment. But one express objective of the new category was to permit class actions of damage claims that were too small to be brought separately. As put by the reporter for the 1966 Amendments, the Rule 23(b)(3) category was designed "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. Rev. 497, 497 (1969).

This Court acknowledged this "effective strength" function of the class action shortly after passage of the 1966 Amendments which created Rule 23(b)(3). In *Eisen* v. *Carlisle & Jacquelin*, for example, the Court reviewed the certification of a class action involving the antitrust and securities claims of numerous odd-lot traders against two odd-lot dealers who handled 99% of all odd-lot trades at the time.

417 U.S. 156, 160 (1974). Each claim was small, with the named plaintiff seeking only $70. *Id.* at 161. The *Eisen* Court noted that "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Id.*

Four years later, in *Coopers & Lybrand* v. *Livesay*, this Court rejected the "death knell" doctrine, which permitted plaintiffs to appeal the denial of class certification when the denial effectively ended the litigation. 437 U.S. 463, 470 (1978). In rejecting the "death knell" rule, however, the Court did not "question[] th[e] assumption" that gave rise to the rule: "that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." *Id.* at 469-70.

This Court has since expressly highlighted the function of the class action in enabling the litigation of numerous small claims against a common defendant. For example, in *Amchem Prods., Inc.* v. *Windsor*, which concerned a global class action settlement of asbestos claims, the Court stated unequivocably that:

> The policy at the very core of the class action mechanism is to overcome the problem that

> small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.

521 U.S. 591, 617 (1997) (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Recently, this Court again pointed out this "policy at the very core of the class action mechanism." *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202 (2013) (quoting *Amchem*). In doing so, the Court stressed that securities fraud class actions "are an essential supplement to criminal prosecutions and civil enforcement actions." *Id.* at 1201 (citations omitted).

Indeed, the small claims function of the class action is universally accepted by the Courts of Appeals. To borrow the colorful language of the Seventh Circuit, class actions are necessary to enable numerous small claims to be filed against a common defendant because, in the absence of a class action, "only a lunatic or a fanatic sues for $30." *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (citations omitted). Other Circuit Courts have made the same or similar observations about the need for class actions in small claims litigation. *Accord In re Am. Express Merchants' Litig.*, 634 F.3d 187, 194 (2d Cir. 2011).

In fact, as recently noted by the Sixth Circuit, "one of the purposes of consumer class actions" like the one brought by respondents in this case "is the need to insure that mistreatment of consumers will not be insulated because the damage suffered by an individual consumer is too small to justify the expense and time required to challenge the practice." *Gascho* v. *Global Fitness Holdings, LLC*, --- F.3d ---, 2016 WL 2802473 at *13 (6th Cir. May 13, 2016).

Even outside of Article III courts, class actions and other forms of aggregation have proven invaluable in legislative courts and administrative agencies to "improve access to legal and expert assistance by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to pursue on an individual basis." Administrative Conference of the United States, *Aggregate Agency Adjudication*, Final Report, 59 (May 3, 2016), *available at* https://www.acus.gov/report/aggregate-agency-adjudication-final-report.

B. The class action enables small claims litigation against a common defendant through cost sharing, attorney's fee awards for the class attorney, and incentive awards for the class representative.

Three features of the class action enable the litigation of numerous small claims against a common defendant. *First*, the class action "aggregat[es] many individual claims into a single suit and distribut[es] the costs of representation across the entire claimant group." 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:7 (5th ed. 2011). By imposing the sharing of common costs among the numerous class members, the class action reduces the cost for *each* member of investing in an issue common to the class.

Second, the class action provides an economic incentive to the class attorney to invest in common issues for the benefit of the class members. This incentive is created by the potential attorney's fee award, which is typically calculated as a percentage of the total class recovery. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. b (2010) (noting the preference for "the percentage method" among courts).

Although such attorney's fee awards can be controversial given their large size, their size is necessary to provide a sufficient incentive to invest in common issues. For example, assume that an expert necessary to prove a common issue of liability would cost $10,000, which would preclude a plaintiff from suing if she only had a claim worth $100. Even if this cost is shared among 10,000 class members with similar $100 claims, a class representative would still be dissuaded from investing the entire amount up front. *See Rand* v. *Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991), *overruled on other grounds by Chapman* v. *First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015) ("The very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs."). However, the class attorney has an incentive to invest in the $10,000 expert because her own recovery would be a percentage of the total class recovery (10,000 x $100, or $1 million), thus making an investment in such an expert worthwhile. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 399–400 (2000) (providing a similar example).

Ensuring that the class attorney has a sufficient incentive to invest in common issues is crucial because the defendant already has a sufficient incentive to make similar investments. In the

example above, the defendant faces the prospect of $1 million in liability, regardless of whether the litigation proceeds as a class action or not. *See* David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 306 (2014). For that reason, this Court has stressed that the class action "solves this problem" of asymmetric stakes "by aggregating the relatively paltry potential recoveries into *something worth someone's (usually an attorney's) labor*." *Amchem*, 521 U.S. at 617 (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) (emphasis added)).

Third, the class action typically provides an incentive award to the class representatives to ensure they adequately represent the class, which, in turn, promotes the finality of any class judgment. *See Espenscheid* v. *DirectSat USA, LLC*, 688 F.3d 872, 874-75 (7th Cir. 2012) (citing 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:27 at 137–42 (6th ed. 2010)). An incentive award compensates for such risks as "liab[ility] for the defendant's costs or even, if the suit is held to have been frivolous, for the defendant's attorneys' fees." *Espenscheid*, 688 F.3d at 876. It also compensates for non-monetary risks, such as the time, inconvenience and reputational costs that representatives assume on behalf of other class members. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to*

Class Action Plaintiffs: An Empirical Study, 53 UCLA L. REV. 1303, 1305 (2006).

In some cases, class representatives also must appeal—even after their individual claims are satisfied—to prevent a collateral attack on the final judgment and, thus, conserve judicial resources. *Gonzales* v. *Cassidy*, 474 F.2d 67, 73 (5th Cir. 1973) (finding judgment did not bind the class after the class representative did not appeal after obtaining full relief for himself, but only retrospective relief for the class members); *see also Espenscheid*, 688 F.3d at 876 ("[J]udicial economy will rarely be served by preventing the settling plaintiff from appealing."). Indeed, recent amendments to Rule 23 make clear that "[w]hether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole." Fed. R. Civ. P. 23, advisory committee notes to the 2003 amendments (discussing Fed. R. Civ. P. 23(g)(2)). These amendments strongly imply that the class representative *also* has a duty to adequately represent the class prior to class certification.

C. The function of the class action informs whether the named parties have a sufficient stake for purposes of Article III.

This Court has discussed the role that the function of the class action plays in determining Article III justiciability in two cases decided the same day: *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326 (1980) and *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388 (1980). In both cases the Court stressed (1) the importance of the interests created by the class action and (2) the operation of the class action mechanism in determining whether the named parties have a sufficient stake for purposes of Article III.

In *Roper*, for example, the named parties of a proposed class action asserting credit card claims sought to appeal the denial of class certification. 445 U.S. at 327-328. However, the defendants contended that the case was moot because they offered to pay the named parties' claims in full, an offer the parties rejected. *Id.* at 329-30.

In reviewing the mootness issue, the *Roper* Court "beg[a]n by identifying the interests to be considered when questions touching on justiciability are presented in the class-action context." *Id.* at 331. These interests included both the interest the named plaintiffs had in their own claims, and "their related

right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims." *Id.*

In discussing the distinct interest the parties have in employing the class action, the Court pointed to the function of the class action in enabling the litigation of small claims against a common defendant. Specifically, the *Roper* Court noted:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

445 U.S. at 339.

With this function in mind, the Court concluded that the rejected offer did not "moot[] the plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *Id.* at 332-33. In particular, the Court credited the plaintiffs' asserted "desire to shift part of the costs of litigation to those who will share in its benefits if the class is

certified and ultimately prevails." *Id.* at 336. Indeed, the *Roper* Court further noted that the "[t]he prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys." *Id.* at 338. Accordingly, in permitting the appeal to go forward, the *Roper* Court recognized the distinct economic interests created by the class action to perform its function.

This Court reached a similar result in *Geraghty*, but focused less on the economic interests created by the class action and more on the operation of the class action itself. There the Court addressed whether the named representative party of a class action asserting prisoners' claims could appeal the denial of class certification even though his own claim was mooted by his release. 445 U.S. at 394. As in *Roper*, the *Geraghty* Court discussed the function of the class action, highlighting "[t]he justifications that led to the development of the class action," which "include[d] . . . the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." 445 U.S. at 402-03 (citing Fed. R. Civ. P. 23, advisory committee notes to the 1966 amendments).

The *Geraghty* Court concluded that the named party could appeal the denial of class certification despite his mooted claim because "[t]he proposed

representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined." *Id.* at 404. Unlike in *Roper*, the *Geraghty* Court did not rely upon the economic interests that the class action created for the named plaintiff, but on the interest in representing the class itself.

But the Court did not rely *solely* on the named party's interest in representing the class. The Court further noted that, in the context of a class action, "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" *Id.* Implicit in the *Geragthy* Court's conclusion is a recognition that the operation of the class action can assure "vigorous advocacy" by imposing cost sharing, incentivizing the class attorney, and providing incentives to the class representatives.

This Court continues to adhere to *Roper* and *Geraghty*. This term, in *Campbell-Ewald Co.* v. *Gomez*, the Court addressed a similar situation to the one in *Roper*—whether a representative can appeal the denial of class certification when presented with an offer of judgment that would satisfy his entire claim. 136 S. Ct. 663, 668 (2016). As in *Roper*, the plaintiff in *Campbell-Ewald* did not accept the offer. *Id.* This Court concluded that because the offer was not accepted, there remained adversity because "Gomez gained no entitlement to

the relief Campbell previously offered" and, accordingly, "both retained the same stake in the litigation they had at the outset." *Id.* at 670-71. The Court did not discuss *Roper*, but it did not have to. In *Campbell-Ewald*, the named parties had a sufficient personal interest in their own claims to obviate any need to examine the interests the class action creates.

Even more recently, in *Spokeo, Inc.* v. *Robins*, this Court addressed whether a party had alleged a sufficient "injury-in-fact" to appeal the denial of class certification. No. 13-1339, slip op. (U.S. Sup. Ct. May 16, 2016) . In *Spokeo*, this Court noted in a footnote

> "[T]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'"

Id. at 6-7 n.6 (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976)).

This observation in *Spokeo* does not undermine either *Roper* or *Geraghty*. In both *Roper* and *Geraghty* the Court did not make a "class action" exception to the law of standing, as the named parties in both *Roper* and *Geraghty* were, in fact,

injured. *See Roper*, 445 U.S. at 332 ("[The named parties'] complaint asserted that they had suffered actual damage as a result of illegal acts of the bank. The complaint satisfied the case-or-controversy requirement of Art. III of the Constitution."); *Geraghty*, 445 U.S. at 404 n.11 ("This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought."). Instead, in both *Roper* and *Geraghty*, the Court looked to the function of the class action to determine whether the stakes were sufficient to permit the litigation to *continue*, and in both cases the Court looked to the function of the class action to determine what those stakes were.[2]

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[2] In a recent, non-class action case, *Genesis Healthcare Corp.* v. *Symczyk*, the Court did question in a footnote the viability of *Roper* given recent precedent that has held "that "[an] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." 133 S. Ct. 1523, 1532 n.5 (2013) (citing *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)).

However, the concern expressed in *Symczyk* is misplaced. As noted above, the class action does not manufacture justiciability but enables the litigation of already justiciable claims. Moreover, and as *Symczyk* itself acknowledged, the class action does more than simply create an interest in attorney's

(*Footnote continued*)

More importantly, the interests created by a class action are designed not to manufacture a justiciable controversy where none exists, but to ensure sufficient incentives to litigate in an *already justiciable case*. In fact, the class action fulfills the core Article III objective of ensuring "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *United States* v. *Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)); *see also* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 87 & n.86 (2007) ("Cases using this quotation . . . are legion").

That "concrete adverseness" is precisely what the class action is designed to create. It provides economic incentives to both the class representative and the class attorney to litigate and develop claims that otherwise would never be brought. It is the operation of the class action in motivating the litigation of small claims that explains why the Court

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fees, as it also permits the named party "to shift a portion of attorney's fees *and expenses* to successful class litigants." 133 S. Ct. at 1532 (emphasized added). Indeed, this Court in *Roper* specifically credited the plaintiff's "desire to shift part of the *costs* of litigation to those who will share in its benefits if the class is certified and ultimately prevails." 445 U.S. at 336 (emphasis added).

in *Geraghty* stated that, in the class action context, "vigorous advocacy can be assured through means other than the traditional requirement of a 'personal stake in the outcome.'" 445 U.S at 404.

II. ARTICLE III DOES NOT BAR THE RESPONDENTS' APPEAL.

A. The respondents have a sufficient stake in the litigation for purposes of Article III.

The respondents' appeal is justiciable once the function of the class action is properly taken into account. In this case the respondents brought suit in 2011 against Microsoft shortly after a class action asserting similar claims was denied certification. *See In re Microsoft Xbox Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D Wash. Oct. 5, 2009) (J.A. 21-24). Based on that earlier denial, the district court struck the class allegations contained in the respondents' complaint, which effectively served as a denial of class certification. (J.A. 88-99). After the respondents' unsuccessfully sought interlocutory appeal of the denial of class certification, *see* Fed. R. Civ. P. 23(f), the respondents then voluntarily dismissed their lawsuit to allow them to appeal the denial of class certification.

Despite the dismissal of their lawsuit, this Court still possesses jurisdiction over the respondents'

appeal under Article III. As in *Roper*, the respondents still retain a separate interest in representing the class which includes an economic interest in sharing costs. 445 U.S. at 336. Moreover, and unlike in *Roper*, the respondents also retain an interest in receiving an incentive award for serving as class representatives. Respondents' Br. at 53 ("[R]espondents may eventually obtain an 'incentive award' for winning efforts.").

In fact, the possibility of an incentive award strengthens the respondents' personal stake for Article III purposes. This is because the class representative's interest in an incentive award is akin to the interest of the relator in a qui tam action, who has a partial interest in the recovery despite not being injured. This Court has recognized the relator's partial interest in the recovery as sufficient for purposes of Article III. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000); *see also Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 271 (2008) (concluding that an assignee of the right to bring a claim has standing under Article III). The class representative's interest in an incentive award is similar because "[i]f a class is certified and is awarded a judgment or settlement, the named plaintiffs will be in effect partial assignees of the money awarded the class.' *Espenscheid*, 688 F.3d at 876; *cf.* Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 591-92 (2014)

(analogizing interest in class action award to interest of relator in a qui tam action).

Finally, permitting the respondents to appeal the denial of class certification would not undermine the policies that underlie the law of Article III justiciability. This Court has recently emphasized the importance of Article III in maintaining the separation of powers, as it "serve[s] to prevent the judicial process from being used to usurp the powers of the political branches." *Spokeo*, slip. op. at 6 (quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. ---, slip op. at 9 (U.S. Sup. Ct. 2013)). However, "[t]his concern is generally absent when a private plaintiff seeks to enforce only his personal rights against another party." *Spokeo*, slip op. at 2 (Thomas, J., concurring). Accordingly, because the respondents are private individuals seeking to enforce their personal rights in nondefective Xbox consoles against Microsoft, a private company, exercising jurisdiction in this case raises no separation of powers concerns.

Moreover, allowing the respondents to appeal would promote another important goal of the law of Article III justiciability—ensuring that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *See United States* v. *Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

B. Revising the law of justiciability would be inappropriate given this record.

Microsoft does not challenge *Roper* or *Geraghty*, but argue that this case is distinguishable because the respondents voluntarily dismissed their lawsuit. Petitioners' Br. at 34-40. Microsoft points to a non-class action case for the proposition that "a plaintiff who voluntarily dismissed his complaint may not [appeal from that dismissal]." *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 680-81 (1958).

Although respondents dismissed their lawsuit, they did not forgo their right to bring a class action. In dismissing the lawsuit, the respondents here expressly stipulated their intent "to appeal the Court's March 27, 2012 Order (Dkt. 32) striking the Plaintiffs' class allegations." Pet. App. 39a (quoting J.A. 122-23). Accordingly, this case is an improper vehicle for recognizing a "voluntariness" exception to *Roper* and *Geraghty* because the respondents did not voluntarily dismiss their interest in litigating a class action. Under both *Roper* and *Geraghty*, that interest is sufficient alone to support Article III justiciability.

Adopting the distinction that Microsoft offers—that a class representative cannot appeal the denial of class certification if she voluntarily dismisses her claim—may also introduce needless confusion into the law of Article III justiciability. Whether a

representative in fact voluntarily dismissed her claim will not always be cut and dried.

This is especially true here, where it is doubtful from the record that the respondents waived their claims *at all*. Specifically, in dismissing their lawsuit, the parties stipulated that the dismissal "was not filed pursuant to a settlement agreement" and, while dismissing their claims with prejudice, the respondents did reserve their right to re-assert their own claims should the denial of class certification be reversed. Pet. App. 36a.

This Court has wisely declined to revisit the settled principles established in *Roper* and *Geraghty* given the record in other recent cases. *See Campbell-Ewald*, 136 S. Ct. at 672 (declining to address "hypothetical" situation not before court); *Symczyk*, 133 S. Ct. at 1529, 1532 & n.5 (2013) (declining to revisit *Roper*, concluding that both *Roper* and *Geraghty* "are inapposite . . . because these cases are, by their own terms, inapplicable to these facts"). The Court should similarly decline to create a new "voluntariness" exception given the murky record here.

CONCLUSION

As set forth above, the Court should affirm the judgment of the Court of Appeals as justiciable under Article III.

Respectfully submitted,

RISHI BHANDARI
Counsel of Record
MANDEL BHANDARI LLP
80 Pine Street
33rd Floor
New York, NY 10005
(212) 269-5600
rb@mandelbhandari.com
Counsel for Amici Curiae

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